NOT DESIGNATED FOR PUBLICATION

DIVISION IV

CA06-448

JENNIFER JONES and
JAMES JONES

January 17, 2007

APPELLANTS
V.

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[NO. JV-2004-404]

ARKANSAS DEPARTMENT OF HUMAN SERVICES

HON. MARK HEWETT, CIRCUIT JUDGE

AFFIRMED

APPELLEE

JOSEPHINE LINKER HART, Judge

Jennifer Jones and James Jones appeal separately from an order of the Sebastian County Circuit Court terminating their parental rights to their three minor children, N.J., T.J., and Tr.J., who at the time of the termination hearing were five, three, and two years old, respectively. On appeal, both Jennifer and James argue that the trial court erred in finding that there was sufficient clear and convincing evidence for the termination of their parental rights. They contend that the trial court erred by failing to make a specific finding as to "potential harm to the health and safety of the child[ren]," and there was insufficient evidence of their "parental incapacity or indifference to remedy the circumstances." We affirm.

Although Jennifer's and James's briefs were submitted by different attorneys, they assert the same points, and the majority of the pages in their approximately nine-page

arguments are identical. We will therefore address their arguments together, noting the specific factual predicates as they apply to each appellant.

Termination of parental rights cases are reviewed de novo. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). We review the factual basis for terminating parental rights under a clearly erroneous standard. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established. *Id*. In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Id.* Additionally, we have noted that, in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Id*. However, with regard to errors of law, no deference is given to the trial court's decision. *See Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003).

The Joneses first argue that the trial court erred by failing to make "any specific findings of fact of potential harm to the health and safety of the children by continued contact with the parent." Citing *Bearden v. Arkansas Department of Human Services*, 344 Ark. 317, 42 S.W.3d 397 (2001), they contend that Arkansas Code Annotated section 9-27-341 (a) (Supp. 2005), makes such a finding is "mandatory."

Jennifer notes that the children were taken into custody because her boyfriend had beaten one of the children, and she concedes that the situation that caused her children to be taken into ADHS custody posed a risk of harm to the children. Further, she admits that the

situation was "due to a relationship heavily dependent upon drugs." However, she argues that she "took the necessary steps to remedy this situation by getting drug treatment."

James, who was incarcerated in the Arkansas Department of Correction for residential burglary, argues that there was no evidence presented that the children were in any danger when in his custody. He asserts that the incident that caused the children to be taken into ADHS custody occurred while he was absent from the home. James admits, however, that had he not committed a crime he would have been "there for his children." He claims that he understands "the toll that drug use has taken on his life and that of the children," and he asserts that he is willing to make changes to gain custody of his children. Finally, he contends that there is no evidence that any living situation he has been in was, or would be in after his release from prison, harmful to the children. We find none of these arguments persuasive.

First, we note that the trial court did make the findings required by Arkansas Code Annotated section 9-27-341(a). The statute states in pertinent part:

> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
> (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents;

Here, the trial court found that it was in the best interest of the children to terminate the parental rights of Jennifer and James because, based on clear and convincing evidence, "it is not possible for the juveniles to be returned to either parent within a reasonable period of time as viewed from the perspective of the children." Furthermore, the Joneses' reliance on *Bearden, supra,* under this point appears to be misplaced. In *Bearden,* the supreme court cited with approval testimony from ADHS case workers that there was "potential harm" in keeping children in an uncertain state caused by the spotty compliance with a case plan, including repeated positive drug tests—precisely the situation that we are confronted with in the instant case. Under our de novo review, we hold that the parents' repeated failure to conform to the requirements of their case plan, which equates to the failure to bring "permanency" to the lives of their young children, constitutes the "harm" contemplated by the statute. *Bearden, supra.*

Regarding Jennifer's specific argument, we cannot agree that she rectified the situation that resulted in the removal of her children. As she herself notes, the situation was caused by her abuse of drugs, and the trial court found that she tested positive on thirteen of seventeen drug screens during the pendency of this case, and the most recent positive test was just two weeks before the termination hearing. Furthermore, Lisa Jackson, a substance-abuse counselor at Gateway House, testified that Jennifer was twice admitted to that facility but failed to complete the drug-treatment program. Jackson stated that Jennifer was discharged on April 13, 2005, due to numerous rules violations and was not allowed to return to the facility. While Jennifer did complete an in-patient treatment program at OMART, she

did not comply with a referral for outpatient treatment, and, shortly after her release, she suffered a relapse.

As to James's argument, we note that during much of his children's lives, he has been incarcerated. We agree with ADHS that a prison cell cannot be considered a suitable residence for the children. Furthermore, based on his admitted drug use—he tested positive for illegal drugs seven out of seven times he was tested by ADHS—and extensive criminal history, plus the fact that he was not a meaningful part of his children's lives when he was not incarcerated, we believe that the there was little likelihood of him providing permanency at any time in the foreseeable future.

The Joneses next argue that there was insufficient evidence of parental incapacity or indifference to remedy the circumstances. James admits that while he has "at times been an absent father due to incarceration," he claims that he has shown no incapacity or indifference to remedy the circumstances that caused the children to be taken into ADHS custody. Jennifer similarly glosses over her history, asserting that she has "made every effort to get a job, stay drug free, go to counseling, take a psych-evaluation and create a stable life." We find no merit in the Joneses' arguments.

James was incarcerated when the children were taken into DHS custody, was released during the pendency of this case, and later recommitted to the penitentiary on new charges. We note that by his own testimony, James was not thinking about his children when he committed his crimes. Furthermore, as we noted previously, during the five months that he was out of prison, he tested positive in seven out of seven drug screens administered by

ADHS, failed to attend out-patient drug treatment, refused to pay court-ordered child support, and did not visit with the children on a consistent basis. Finally, by his own admission, James has not had "significant" contact with the minor children since 2002—approximately two years before they were taken into ADHS custody. We cannot say that the trial court erred in finding that there was clear and convincing evidence that James manifested an incapacity or indifference to remedy the circumstances that kept the children in ADHS custody.

Despite her assertions to the contrary, we believe Jennifer's situation is even less compelling. As previously noted, she continued to abuse drugs during the pendency of her case. She failed to complete in-patient drug treatment on two occasions and failed to follow through on out-patient treatment. Additionally, we note that despite being ordered by the court to attend counseling, there was testimony from a therapist for the Western Arkansas Counseling and Guidance Center, Karen Infield, that Jennifer had only three counseling appointments with her in the spring of 2005, then stopped attending scheduled sessions. Accordingly, as with James, we cannot say that the trial court erred in finding that Jennifer manifested an incapacity or indifference to remedy the circumstances that kept the children in ADHS custody.

Affirmed.

GRIFFEN and BIRD, JJ., agree.